Choo Yoke Choy v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–136 OF 1989
HARUN HASHIM AND MOHAMED YUSOFF SCJJ AND ANUAR J
17 SEPTEMBER 1992

Criminal Law *— Dangerous drugs — Trafficking — Presumption of possession of drugs — Proof of custody or control of drugs — Drugs found in room occupied by appellant and wife — Whether appellant alone had custody or control — Necessity to prove common intention between appellant and wife — Dangerous Drugs Act 1952 ss 37(d) & 39B(1)(a)*

Criminal Law *— Dangerous drugs — Trafficking — Presumption of possession of drugs — Proof of custody or control of drugs — Drugs found in two locations of house: in room occupied by appellant and wife and in common kitchen accessible to other occupants — Whether appellant had custody or control of drugs — Manner in which evidence to be considered — Dangerous Drugs Act 1952 ss 37(d) & 39B(1)(a)*

Evidence *— Information leading to fact discovered — Admissibility of statement — Evidence Act 1950 s 27*

A party of police officers, acting on information received, raided a house. There were ten persons in the house and the police officer in charge informed them of his desire to search their rooms. On entering the appellant's room, the police officer carried out a search in the presence of the appellant and his wife and recovered a plastic bag lying on the floor of the room in which were found plastic packets containing heroin. The police officer then questioned the appellant and the latter informed the police officer that 'there were more drugs outside'. The appellant led the police officer to the kitchen at the rear portion of the house, and there handed over to the police officer a tin container and another package, which were later confirmed to contain heroin. It was not disputed that the kitchen was a common kitchen, accessible to all the occupants of the house. The appellant and his wife were initially charged jointly with trafficking in dangerous drugs but subsequently the charge against the wife was withdrawn. The appellant was convicted and he appealed.

Held, allowing the appeal:

(1) The trial judge failed to address his mind to the fact that the drugs were recovered from two different locations in the house. As a matter of prudence the evidence ought to have been considered separately. The circumstances surrounding the recovery of the drugs in the common kitchen differ from those which led to the recovery of the drugs in the appellant's room.

(2) With regard to the recovery of the drugs in the appellant's room, the evidence before the court was not sufficient to establish that the appellant alone had the drugs in his custody or under his control as there were two people occupying the room at the

material time. The prosecution must therefore prove that both the appellant and his wife had custody or control of the drugs by establishing a common intention between them in order to succeed.

(3) The fact that the prosecution had earlier charged both the appellant and his wife jointly gave rise to an inference that there was common intention but when the charge against the wife was withdrawn, there was no longer any evidence of common intention. The prosecution had failed to establish that the appellant had custody or control of the drugs in the room and therefore the presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 did not arise.

(4) With regard to the discovery of the drugs in the kitchen, the appellant's reply that 'there were more drugs outside', being information which led to the discovery of the drugs in the kitchen, was admissible under s 27 of the Evidence Act 1950. However, it is imperative to consider with utmost care the nature of the information given by the appellant. The appellant's reply did not pin him down to anything incriminating beyond the fact that he knew of the existence of the drugs outside. It is thus not possible to say whether the appellant merely had knowledge of the presence of the drugs or that he had actually hidden the drugs in the kitchen. It is possible that the appellant merely had knowledge of the drugs in the kitchen and nothing more beyond that.

(5) It is not safe for the court to conclude that the appellant had either custody or control of the drugs in the kitchen. The prosecution had therefore failed to prove possession and knowledge of the nature of the drugs on the part of the appellant.

Per curiam: It is trite law that mere knowledge is not sufficient to constitute possession. It is merely one of the ingredients of possession. Without the evidence of custody or control, the presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 cannot arise.

[Bahasa Malaysia summary

Suatu pasukan pegawai polis, bertindak atas maklumat yang diterima, telah menyerbu suatu rumah. Terdapat sepuluh orang di dalam rumah itu dan pegawai polis yang bertanggungjawab telah memberitahu mereka polis hendak menggeledah bilik mereka. Apabila pegawai polis itu masuk ke bilik perayu dan menggeledah bilik itu di hadapan perayu dan isterinya, suatu beg plastik telah dijumpai terletak di atas lantai bilik itu dalam mana terdapat bungkusan-bungkusan plastik yang mengandungi heroin. Pegawai polis itu kemudian telah menyoal perayu dan perayu telah memberitahu pegawai polis itu bahawa 'ada lagi dadah di luar'. Perayu membawa pegawai polis itu ke dapur di belakang rumah itu dan di sana menyerahkan kepada pegawai polis itu sebuah bekas tin dan satu lagi bungkusan, yang kemudiannya telah

disahkan mengandungi heroin. Ia tidak dipertikaikan bahawa dapur itu adalah dapur bersama, yang terbuka kepada semua penghuni rumah itu. Perayu dan isterinya telah pada mulanya dituduh bersesama mengedar dadah berbahaya tetapi kemudiannya pertuduhan terhadap isteri itu telah ditarik balik. Perayu telah disabitkan dan telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Hakim perbicaraan telah gagal menumpukan fikirannya kepada fakta bahawa dadah itu telah didapati daripada dua lokasi yang berlainan di rumah itu. Demi berhati-hati keterangan itu sepatutnya dipertimbangkan secara berasingan. Keadaan yang menyelubungi penjumpaan dadah di dapur bersama itu berlainan daripada yang menyebabkan penjumpaan dadah di dalam bilik perayu.

(2) Berhubung dengan penjumpaan dadah di dalam bilik perayu, keterangan di hadapan mahkamah tidak mencukupi untuk membuktikan bahawa perayu sendiri mempunyai dadah itu dalam jagaannya atau di bawah kawalannya kerana terdapat dua orang yang tinggal di bilik itu pada masa yang penting itu. Pihak pendakwa oleh itu mesti membuktikan yang jagaan atau kawalan dadah itu ada pada kedua-dua perayu dan isterinya dengan membuktikan suatu niat bersama antara mereka jika pihak pendakwa hendak berjaya.

(3) Fakta bahawa pihak pendakwa telah pada awalnya menuduh kedua-dua perayu dan isterinya bersama menimbulkan kesimpulan bahawa terdapat niat bersama antara mereka tetapi apabila pertuduhan terhadap isteri itu ditarik balik tidak terdapat lagi sebarang keterangan niat bersama. Pihak pendakwa telah gagal membuktikan bahawa jagaan atau kawalan dadah di dalam bilik itu ada pada perayu dan oleh kerana itu anggapan milikan di bawah s 37(d) Akta Dadah Berbahaya 1952 tidak timbul.

(4) Berhubung dengan penjumpaan dadah di dalam dapur itu, jawapan perayu 'ada lagi dadah di luar' merupakan maklumat yang menyebabkan penjumpaan dadah di dapur itu dan boleh diterima di bawah s 27 Akta Keterangan 1950. Akan tetapi, adalah penting sekali mempertimbangkan dengan sangat berhati-hati sifat-sifat maklumat yang diberi oleh perayu. Jawapan perayu tidak memerangkapnya dengan apa-apa yang menunjukkan dia bersalah melainkan fakta yang dia tahu akan kewujudan dadah di luar. Oleh itu tidak boleh dikatakan sama ada perayu hanya tahu tentang adanya dadah itu atau dia sebetulnya telah menyembunyikan dadah itu di dalam dapur itu. Mungkin perayu hanya tahu bahawa dadah itu ada di dapur itu dan tidak lebih dari itu.

(5) Adalah tidak selamat untuk mahkamah memutuskan bahawa jagaan atau kawalan dadah di dapur itu ada pada perayu. Oleh kerana itu pihak pendakwa telah gagal membuktikan milikan dan pengetahuan sifat dadah itu pada bahagian perayu.

Per curiam: Adalah undang-undang biasa yang hanya mengetahui tidak cukup untuk merupakan milikan. Ia adalah semata-mata satu

daripada faktor milikan. Tanpa keterangan jagaan atau kawalan, anggapan milikan di bawah s 37(d) Akta Dadah Berbahaya 1952 tidak boleh timbul.]

Notes

For cases on ss 37(d) and 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) paras 150–151, 158–162 and 176–180.

For cases on admissibility of statement leading to fact discovered and s 27 of the Evidence Act 1950, see 7 *Mallal's Digest* (4th Ed) paras 901–905.

Cases referred to

1 *Leow Nghee Lim v R* [1956] MLJ 28 (folld)
2 *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314 (folld)
3 *Choo Chang Teik & Anor v PP* [1991] 3 MLJ 423 (refd)
4 *PP v Lai Ah Bee* [1974] 2 MLJ 74 (folld)
5 *PP v Khoo Boo Hock & Anor* [1990] 1 CLJ 971 (folld)
6 *Low Geok Yeok v PP* [1982] 2 MLJ 346 (refd)
7 *Wai Chan Leong v PP* [1989] 3 MLJ 356 (folld)
8 *Tai Chai Keh v PP* [1948–49] MLJ Supp 105 (folld)
9 *Yee Ya Mang v PP* [1972] 1 MLJ 120 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a), (2)
Evidence Act 1950 s 27

Appeal from: Criminal Trial No CR 58–9 of 1986 (High Court, Kuala Lumpur)

Gurbachan Singh (*Bachan & Kartar*) for the appellant.
Mohd Yusof bin Haji Zainal Abidin (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Anuar J (delivering the judgment of the court):

The facts

The appellant was tried and convicted in the High Court at Kuala Lumpur on a charge of trafficking in dangerous drugs, to wit, 109.81g of heroin, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised Act 234/80), punishable under s 39B(2) of the same Act, as amended by Act A553/83.

The facts of the case, as established during the trial, are as follows. On 27 March 1985, at about 12.10am, acting on information received, a party of police officers led by Insp Yusoff (PW3) raided an unnumbered house at Kampung Pandan Jaya, Ampang, Selangor. The house was occupied by

several people, including the appellant, his wife (Tham Lai Ngor) and some relatives.

On arrival at the house, PW3 identified himself and rounded up all the occupants of the house in the hall. There were ten persons altogether, seven females and three males. PW3 informed them of his desire to search their rooms, and then proceeded accordingly, accompanied by one Insp Lai Joo Wah.

Upon entering the appellant's room, PW3 carried out the search in the presence of the appellant and the wife and recovered a red plastic bag lying on the floor of the room. The bag contained a package wrapped with newspapers, and in it were discovered seven small plastic packets containing substances suspected to be dangerous drugs. Upon their being sent to the chemist for analysis, the substances were confirmed to contain 8.50g of heroin.

Following the discovery of the substances, PW3 questioned the appellant, whereupon the appellant informed PW3 that there were some more drugs outside. According to PW3, the appellant then led him to the kitchen, which was situated at the rear portion of the house. By this time, PW3 said that the appellant had already been arrested and handcuffed.

Further evidence by PW3 showed that he was handed by the appellant a tin container and another package which the appellant had recovered from under a stove in the kitchen. The container and the package were later confirmed by the chemist to contain 13.06g of heroin and 88.25g of heroin, respectively.

The above, in essence, formed the basis of the prosecution's case against the appellant.

Following the arrest and discovery of the drugs, the appellant and his wife were charged jointly under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). However, on 21 May 1986, the charge against the appellant's wife was withdrawn.

Presumption under s 37(d)

It is evident at the trial that the prosecution relied on the legal presumption provided under s 37(d) of the Act. Under s 37(d) of the Act, a person found to have custody or control of any dangerous drugs shall be deemed to be in possession and know the nature of such drugs until the contrary is proved.

On the evidence adduced before him, the learned trial judge held that the appellant had care and custody of the drugs. Relying on the said presumption under the Act, he accordingly held that the appellant was in possession of the drugs. Regrettably, the learned judge failed to address his mind to the fact that the drugs were recovered from two different locations in the house. Nowhere in his judgment did he consider the different circumstances which led to the recovery of the drugs at these two locations.

With respect to the learned judge, we feel that as a matter of prudence the evidence ought to have been considered separately. The circumstances surrounding the recovery of the drugs in the common kitchen differ from those which led to the recovery of the drugs in the appellant's room.

With regard to the recovery of the drugs in the appellant's room (which the appellant shared with his wife), the prosecution must show that either the appellant alone had possession of the drugs or that he and his wife had joint possession of the substance. In the case of joint possession, the prosecution has to prove that the appellant and his wife had a common intention. The crucial question is: has the prosecution been able to prove common intention?

The evidence before the court shows that the appellant and his wife were the only occupants of the room in question. Although the room was not locked during the day, it was kept locked at night and was therefore not accessible at night to any other person except the appellant and his wife. At the material time when the drugs were recovered, only the appellant and his wife had access to the room. The prosecution therefore has to establish beyond reasonable doubt that the appellant alone had possession of the drugs or that both he and his wife had joint possession of the drugs.

In our opinion, the evidence before the court was not sufficient to establish that the appellant alone had the drugs in his custody or under his control. The drugs were found lying on the floor. They were not hidden. It is not probable to suggest that the appellant *alone* had custody or control of the drugs since there were two people occupying the room at the material time. The mere fact that the drugs were found in the room does not necessarily prove that the appellant had *sole custody or control.* It is not conclusive evidence; it is neutral in nature. At best, the evidence before the court shows either the appellant or his wife could have custody or control of the drugs. In *Leow Nghee Lim v R*,[1] Taylor J said at p 29:

> There is no presumption of custody. The presumption is from custody. Unless custody was established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.

The prosecution must therefore prove that the appellant and his wife had custody or control of the drugs. To do this, the prosecution must establish a common intention between the appellant and his wife. The case against the appellant cannot succeed unless there is evidence of such common intention or evidence from which such common intention can properly be inferred.

Common intention

In *Shamsuddin bin Hassan & Anor v PP*[2] this court held that it is essential that there should be evidence of common intention. In that case, two persons (a husband and wife) were jointly charged with trafficking in 1,614.1g of cannabis, an offence under s 39B(1)(a) of the Act, read with s 34 of the Penal Code (FMS Cap 45). They were both convicted by the High Court at Ipoh. On appeal, this court held that the learned trial judge

failed to consider the provisions of s 34 of the Penal Code (FMS Cap 45) in respect of common intention and allowed the appeal. In that case, the prosecution's evidence was that while the accused were travelling in a car driven by the husband, they were chased by the police. In the chase, the police said they saw a bundle being thrown out of the left window of the car. The police picked up the bundle, which was a batek cloth stuffed with cannabis. Allowing the appeal, the court said:

> There was no evidence as to who actually threw out the bundle but it was sought to be inferred it must be the wife-appellant as the bundle was thrown out of the left side of the car, the car having only two doors and the wife-appellant sitting next to the husband-appellant who was driving the car ... at best the evidence showed that one of the appellants must have had custody or control of the drugs to throw it out of the car. But who?

Further along in this judgment, the court said:

> The mere fact of a bundle being thrown out of the car is not evidence of common intention or evidence from which such common intention can properly be inferred ...
>
> It would have been different if only one of the appellants was in the car at the material time or one of them was actually seen throwing the bundle out of the car.

It was accordingly held that there was no evidence of custody or control of the drugs to raise the presumption under s 37(d) of the Act that the appellants were in possession of the drugs and the further presumption that they must have known that the drugs were cannabis. Unless this can be proved, the presumption under s 37(d) of the Act that the appellants were trafficking in drugs did not arise. In our view the same principles apply here.

In *Choo Chang Teik & Anor v PP*[3] this court accepted the appellants' story that they have no knowledge of the drugs found in a bag as sufficient to rebut the presumption under the Act. In that case, the two appellants were charged with trafficking in dangerous drugs under s 37B of the Act. They were arrested as a result of a police raid carried out on a house No 12 Jalan Senohong Satu, Taman Cantik, Cheras, Kuala Lumpur. The police had been maintaining surveillance on the house when at 6pm they saw two cars stopping at the house. They saw the first appellant in one car and the second appellant with one other person, Tan Soon Hock, in the other car. As Tan Soon Hock and the second appellant entered the house, the police saw the first appellant taking out something heavy from the boot of his car and carrying it into the house. At about 6.15pm the police party raided the house. They had to force their way in by breaking the front door with a crowbar. The first appellant was walking towards the kitchen. On seeing the police, he ran away but was arrested some distance away from the house. Tan Soon Hock and the second appellant were in the master bedroom when the police came. The second appellant jumped out of the window but was also arrested some distance away from the house. Tan Soon Hock was arrested in the master bedroom. The police later recovered a travelling bag which contained heroin concealed in the bathroom attached to the master bedroom.

All three of them were jointly charged with the crime. Tan Soon Hock unfortunately died in prison pending trial.

The learned judge held that both the appellants had, under s 37(g) of the Act, knowledge of the nature of the concealed drugs. The appellants in their defence gave a story that the second appellant and Tan Soon Hock had rented the house on 4 November 1985 to be used as an office. On 5 November 1985, Tan Soon Hock took the keys to put something in the house. On 6 November 1985, the first appellant, second appellant and Tan Soon Hock moved into the house to clean the house. While they were in the house, the police party raided the house and they were arrested. In delivering the judgment of this court, it was held that:

> on the evidence as a whole, the defence raised by both the appellants is reasonable and probable and sufficient enough to rebut the presumption under the Act. ...
>
> On a proper assessment of this evidence, it is probable that both the appellants had no knowledge of the offending drugs in the travelling bag recovered from the toilet of the master bedroom. The evidence shows that Tan Soon Hock was alone in the room when he was arrested.

In the case before us the fact that the prosecution had earlier charged both the appellant and his wife jointly, gave rise to an inference that there was common intention. However, after more than a year, when the charge against the wife was withdrawn, there is no longer any evidence of common intention. Without the evidence of common intention, the appellant alone cannot be said to have had custody or control of the drugs. The evidence as it were is insufficient to establish whether the appellant had custody or control of the drugs or merely had knowledge of the presence of such drugs in the room.

Knowledge

It is trite law that mere knowledge is not sufficient to constitute possession: see *PP v Lai Ah Bee*,[4] followed by Edgar Joseph Jr J in *PP v Khoo Boo Hock & Anor*[5] at p 975. It is merely one of the ingredients of possession. Without the evidence of custody or control, the presumption of possession under s 37(d) of the Act cannot arise.

In the present case, we are of the view that the prosecution has failed to establish that the appellant had custody or control of the drugs and therefore the presumption under s 37(d) did not arise. The appellant cannot be deemed to have possession of the drugs and deemed to have known the nature of the drugs. With respect, we are of the opinion that the prosecution has failed to prove its case against the appellant in respect of the drugs found in the room.

With regard to the discovery of the drugs in the kitchen, the evidence of the prosecution is that the drugs were discovered as a result of information given to the police by the appellant. In answer to some questions by PW3, the appellant had answered that 'there were more drugs outside', and this resulted in the discovery of the drugs in the kitchen. While in the kitchen it was alleged that the accused had taken the drugs from beneath the kitchen table and handed them over to the police.

The appellant refuted the prosecution's version. He denied that he himself took the drugs from beneath the kitchen table. The learned trial judge, however, found as a fact that the appellant did give the information to the police which led to the discovery of the drugs. With respect, we have no reason to disagree with the learned judge's finding of fact. We agree with his conclusion that the appellant had given the information after he was questioned by the police and then led the police to the kitchen where the drugs were discovered.

In evidence, it is not disputed that the kitchen was a common kitchen; it was accessible to all the occupants of the house. It was not enclosed or locked. Besides the appellant, the other occupants of the house had free and unrestricted access to the kitchen. It is clear from the evidence that the appellant was not the only person who could have known of the existence of the drugs under the kitchen table. The other occupants too could similarly have knowledge of the existence of the drugs there.

In *Low Geok Yeok v PP*,[6] the appellant was charged and convicted for trafficking in dangerous drugs under s 39B(1)(a) of the Act. He was originally charged with his wife, but the wife was acquitted and discharged at the close of the case for the prosecution. Allowing his appeal, Gunn Chit Tuan J (as he then was) held:

> There was no evidence that the appellant was in exclusive occupation of the kitchen where the two stoves were found and therefore he could not be held to be the occupier of it ...
>
> The prosecution also did not prove who was in custody or control of those stoves containing the dangerous drug in question and therefore it was not even able to prove who was in possession of the drug in question as the presumption under s 37(d) of the Dangerous Drugs Ordinance 1952 could not be invoked.

In order to found a conviction, the prosecution must establish not only that the appellant had knowledge of the existence of the drugs but that he also had exclusive custody or control of them. The evidence in this case, however, was that after telling PW3 that 'there were more drugs outside' (the appellant's actual words), the appellant had led the police to the kitchen and then took out the drugs from beneath the kitchen table.

Under s 27 of the Evidence Act 1950, a statement or information or so much of the information that led to the discovery of the object is admissible. Therefore the statement or information by the appellant that led to the discovery of the drugs in the kitchen is admissible under this provision of the Evidence Act 1950.

In *Wai Chan Leong v PP*,[7] Gunn Chit Tuan SCJ said (at p 358) that:

> [It] must be borne in mind that for s 27 of the Evidence Act to apply, the information must be such as has caused the discovery of a fact. In other words the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered ...

However, in the context of this case, it is imperative that the court considers with the utmost care the nature of the information given by the appellant that led to the discovery of the drugs. The evidence before the court is that the police asked the appellant 'where he kept some more drugs'. The appellant did not respond directly to this question but merely said that

A there were some more drugs outside. He did not say that he *had kept* some more drugs outside. Nor did he say that he *had* some more drugs outside. His reply did not pin him down to anything incriminating beyond the fact that he 'knew' of the existence of the drugs outside.

In our view, it is not possible to say whether he merely had knowledge of the presence of the drugs or that he had actually hidden the drugs in the B kitchen. He could have given the information to the police merely to assist the latter in recovering the drugs, which actually belong to someone else. In *PP v Khoo Boo Hock & Anor*[5] at p 978, Edgar Joseph Jr J expressed similar sentiments in a case also involving trafficking in drugs. In that case, based on the evidence adduced at the trial, there was a doubt as to whether the C accused had mere knowledge of the drugs or whether he had actually hidden them. The learned judge held, in the circumstances of the case, that:

> [It] would not be possible to say whether they merely had knowledge of the presence of the offending exhibits under the floorboards of the storeroom, and so D were merely assisting the police in their recovery by indicating someone else's guilt.

In the present appeal, it is possible that the appellant merely had knowledge of the drugs in the kitchen, and nothing more beyond that. In view of this doubt, it might be pertinent to refer to *Tai Chai Keh v PP*,[8] in which E Spenser Wilkinson J held (at p 108) that:

> Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of the opinion that the inference most favourable to the accused should be adopted.

In *Yee Ya Mang v PP*,[9] Sharma J said (at p 121) that:

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> [The] mere production of such articles by itself would not necessarily prove his possession. It would at the most show that he had knowledge where the articles were kept or concealed ... In the absence of any incriminating statement made by the accused leading to the discovery of the articles, their production alone ... cannot be sufficient to establish the accused's possession. It may at the most show his knowledge that the articles were concealed there.

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In the circumstances, we are of the opinion that it is not safe for the court to conclude that the appellant had either custody or control of the drugs. In the absence of evidence of custody or control, the presumption under s 37(d) of the Act does not arise: see *PP v Lai Ah Bee*.[4] We are of the opinion, therefore, that as regards the recovery of the drugs in the kitchen, H the prosecution has failed to prove possession and knowledge of the nature of the drugs on the part of the appellant.

For the above reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellant is accordingly acquitted and discharged.

Appeal allowed.

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Reported by Prof Ahmad Ibrahim